محكمة قطر الدولية
ومركز تسوية المنازعات
QATAR INTERNATIONAL COURT
AND DISPUTE RESOLUTION CENTRE

In the name of His Highness Sheikh Tamim bin Hamad Al Thani,

Emir of the State of Qatar

Neutral Citation: [2024] QIC (A) 2

IN THE QATAR FINANCIAL CENTRE

CIVIL AND COMMERCIAL COURT

APPELLATE DIVISION

[On appeal from [2023] QIC (F) 27]

Date: 4 February 2024

CASE NO: CTFIC0020/2023

MANAN JAIN

Claimant/Respondent

v

DEVISERS ADVISORY SERVICES LLC

Defendant/Appellant

JUDGMENT

Before:

Lord Thomas of Cwmgiedd, President

Justice Ali Malek KC

Justice Dr Muna Al-Marzouqi

Order

1. Permission to appeal granted.

2. Appeal owed to the extent that the Appellant is to pay the Respondent QAR 28,000 together with interest from 1 July 2023 until payment at the rate of 5% per annum.

3. No order as to costs – see paragraph 49 below.

Judgment

1. The Appellant ('**Devisers**') seeks permission by an application dated 16 June 2023 to appeal from the judgment of the First Instance Circuit (Justices Dr Rashid Al-Anezi, Fritz Brand and Yongjian Zhang) given on 11 June 2023 in favour of the Respondent ('**Mr Jain**') for QAR 33,000. No order was made for interest.

2. It is necessary in the light of the course these proceedings took to set out the factual background as appeared from the documents and other information placed before the First Instance Circuit and us.

The agreement between the parties

3. On 24 March 2022, a written agreement was entered into between Devisers, a company which offers immigration consultancy services, and Mr Jain, under which Devisers was to assist his wife ('**Mrs Jain**') in obtaining a Sole Representative of an Overseas Business Visa for the United Kingdom. The agreed fee was QAR 33,000 which Mr Jain paid that day. The express terms of the contract included the following:

   Page 1, Clause 5:

   > *If the client revokes this Agreement or change his/ her mind or found to a criminal record after signing this Agreement then DEVISERS shall nevertheless be deemed to have performed its services satisfactorily.*
   >
   > *Clause 6:*

If the Visa application is refused due to the error by the applicant like but not limited to any false/ incorrect information provided by applicant OR any fake document provided by applicant for the application purpose OR If the High Commission makes an enquiry to any authority about the applicant and the authority does not reply to satisfactory level OR if the applicant fails to give correct reply to the questions in the official interview related to the visa application. In all these cases applicant will not be refunded any service charges paid to us.

Clause 7:

DEVISERS will represent the applicant until the successful result of the Visa application. In case the application remains unsuccessful without falling under clause no. 6 (above mentioned clause) of this agreement, any PAYMENT received will be refunded in 2 weeks.

Terms of Business (page 2)

Clause 1:

You are automatically bound by the terms of this application process after you have paid an initial deposit of the total fees or have accepted by signing DEVISERS application form. You are free to decline our offered services before your Visa application is submitted to immigration authorities but you would lose any fee you may have paid to DEVISERS.

In addition you will be liable to pay full service charges or fees agreed in case of withdrawal after submission of application.

Clause 4:

These terms and conditions shall be governed and interpreted in accordance with the laws of the concerned authorities and/or Qatar and the parties submit to the exclusive jurisdiction of the concerned courts and or Qatar International Court of Dispute Resolution Centre (QICDRC) / Qatar.

4. Between 26 March 2022 and 30 March 2022, Devisers sent requests to Mr Jain for the necessary documents. Some were supplied on 2 April 2022. On 4 April 2022, Mr Jain asked if his wife's parents could be added to the application. On the same day, Devisers informed Mr Jain that all the documents must be supplied within 24 hours as the application had to be filed by 11 April 2022 as the Sole Representative of an Overseas Business Visa category was being withdrawn. A chaser email was sent on the following day with a completed draft application.

5. On 5 April 2022, Devisers sent to Mrs Jain a draft visa application for her to check so it could be submitted before the deadline for the type of visa. Mrs Jain emailed Devisers that same day:

> *This is to notify you that we might not be able to take up this any further as I have medical conditions due to which I won't be able to travel and live on my own for prolonged periods of time without the support of family.*
>
> *I'm hereby informing you that we are in talks with the concerned person for not taking this up any further and so would not share the documents because we are not looking forward to apply. I hope for your cooperation.*

6. On 7 April 2022 Mrs Jain confirmed the position.

7. Mr Jain requested the return of the sum of QAR 33,000 paid. There was some discussion as to whether Mr Jain could supply another applicant to Devisers so that the fee paid by Mr Jain could be refunded, but this did not eventuate. Devisers thereafter refused to refund the sum paid, relying on its terms of business.

The proceedings brought by Mr Jain

8. On 13 April 2023, Mr Jain commenced proceedings for the return of the sum paid. The claim was assigned to the Small Claims Track.

9. In the Claim Form:

    a. It was alleged that Mrs Jain had been undergoing IVF treatment since November 2021. She faced difficulties in completing the treatment and the transfer of the embryos was cancelled. Her psychological state did not allow her to continue with the immigration procedures.

    b. This had the consequence that it was impossible to proceed with the agreement. The provisions of article 33 of the QFC Contract Regulations 2005 (the '**Regulations**') relating to mistake were applicable.

10. Evidence was put before the First Instance Circuit about Mrs Jain's medical condition.

a. Two medical reports about the IVF treatment undertaken by Mrs Jain were submitted. The first described the treatment which began in November 2021. On 19 March 2022 the Frozen Embryo Transfer ('**FET**') cycle was initiated. On 29 March 2022 and 4 April 2022 difficulties emerged as the uterus was not then in a condition to receive the transfer of the embryos. Further medication was directed on each occasion. On 10 April 2022, the FET cycle was cancelled as the medication had not resolved the issue. A further FET cycle was initiated on 16 May 2022 but the result was not successful. Neither report dealt with the in ability of Mrs Jain to travel or continue with the application for a visa.

b. There was no reference in the medical report to the decision having been made on 4 April 2022 not to continue with the FET cycle that day. All that is clear is that no transfer was possible that day and further medication prescribed.

11. Devisers in its defence raised numerous issues, but it relied principally on the Terms of Business.

The decision of the First Instance Circuit

12. Mr Jain's case was that there had been a mistake of the kind identified in article 33 of the Regulations and he was entitled to avoid the agreement.

13. Article 33 provides:

ARTICLE 33 – RELEVANT MISTAKE

(1) Mistake is an erroneous assumption relating to facts or law existing when the contract was concluded.

(2) A party may only avoid the contract for mistake if:

(A) the mistake relates to the existence of the subject matter of the contract, the identity the subject matter, the possibility of performing the contract, or the quality or quantity of the subject matter;

(B) when the contract was concluded, the mistake was of such importance that a reasonable person in the same situation as the party in error would only have concluded the contract on materially different terms or would not have concluded it at all if the true state of affairs had been known; and

(C) either:

(i) the other party made the same mistake, or caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error; or

(ii) the other party had not at the time of avoidance acted in reliance on the contract.

(3) However, a party may not avoid the contract if it was grossly negligent in committing the mistake or the mistake relates to a matter in regard to which the risk of mistake was assumed or, having regard to the circumstances, should be borne by the mistaken party.

14. The First Instance Circuit considered it was necessary first to examine whether the conditions in in article 33(2) were satisfied. There was clear evidence that they were:

a. Mr Jain had satisfied the condition in article 33(2) (A). He had thought that his wife would benefit from the visa, but that assumption proved to be a mistake in that because of her medical condition, she could not emigrate to the UK and the visa would be no use to her. Although theoretically she could have obtained a visa, it was in real terms impossible as it would have served no realistic purpose.

b. Mr Jain had satisfied the condition in article 33(2)(C) as Devisers had not done anything in the execution of the agreement.

c. Article 33 (3) was not applicable, as although Mrs Jain's medical condition was known, the seriousness of that condition was not known to the doctors and it was not known that this would prevent Mrs Jain from emigrating to the UK; that only became known on 4 April 2022 when Mr Jain immediately tried to resile from the agreement. There was therefore no gross negligence.

d. If Mr Jain was therefore entitled to terminate the agreement with Devisers under article 33, the terms of the agreement would not apply and he would have been entitled to the return of the deposit.

15. However, in the view of the First Instance Circuit, it was not clear when the medical condition arose, and the possibility could not be excluded that it only arose after the conclusion of the agreement. In that case there would have been no erroneous

assumption relating to facts existing when the agreement was concluded; the condition under article 33(1) would not therefore have been satisfied.

16. However, since the First Instance Circuit was of the view that it could not rely on mistake under article 33, it turned to consider whether the facts relating to the medical condition of Mrs Jain were relevant to the force majeure provisions set out in article 94 of the Regulations. This provides:

> *(1) "Force Majeure" means any circumstances which are not within the reasonable control of the party concerned and which that party could not be reasonably be expected to have taken into account at the time of conclusion of the contract, including without limitation strikes, damage to premises, plant and equipment, breach of a contract by an unrelated third party, governmental action, civil commotion, riot or war and natural physical disaster.*
>
> *(2) Neither party shall be deemed to be in breach of a contract or otherwise liable to the other as a result of any delay or failure in the performance of its obligations if and to the extent that such delay or failure is caused by Force Majeure and the time for performance of the relevant obligation(s) shall be extended accordingly.*
>
> *(3) The party not affected by such Force Majeure shall be relieved from any obligation to make payment to the party affected by the Force Majeure for so long as the performance is suspended except in respect of performance which has been actually carried out, and which complies with the terms of the contract.*
>
> *(4) A party whose performance of his obligations is delayed or prevented by Force Majeure shall:*
>
> > *(A) forthwith notify the other party of the nature, extent, effect and likely duration of the circumstances constituting the Force Majeure;*
> > *(B) use all reasonable endeavours to minimise the effect of the Force Majeure on its performance of his obligations; and*
> > *(C) subject to Article 94(5) forthwith after the cessation of the Force Majeure notify the other party thereof and resume full performance of his obligations.*
>
> *(5) If any Force Majeure delays or prevents the performance of the obligations of either party for a continuous period in excess of six months, the party not so affected shall then be entitled to give notice to the affected party to terminate the contract.*

17. The First Instance Circuit held that under article 94(1), the medical condition of Mrs Jain rendered the execution of the agreement impossible, and this amounted to force

majeure under article 94(1). In consequence, neither party was under the terms of article 94(2) in breach. Although under article 94(3) a party was entitled to claim compensation for performance rendered before the impossibility arose, what had been done by Devisers was so negligible that it was incapable of monetary valuation.

18. Mr Jain was therefore entitled to the return of QAR 33,000. No order for costs was made as the First Instance Circuit thought that Devisers had been entitled to defend the claim. No reasons were set out as to why the payment of interest was not ordered.

The grounds of appeal

19. Devisers sought permission to appeal on a number of grounds: the First Instance Circuit's failure properly to find the facts; its decision was wrong in the facts it found as to the medical condition that enabled it to find mistake and/or force majeure; and there was no medical evidence which showed that Mrs Jain could not travel. There were other reasons why Mr Jain did not proceed. Devisers did more work than the First Instance Circuit acknowledged.

20. It was contended in response on behalf of Mr Jain that in applying the provisions of article 94, we should have regard to the English decisions in *Krell v Henry* [1903] 2 KB 740 and *Taylor v Caldwell* (1863) 3 B&S 826, both well known cases on the law of frustration.

21. We decided that justice would be best served in the circumstances of this case by considering the application for permission and any argument on the appeal in a rolled-up hearing. Pending that determination, we stayed execution of the judgment. We grant permission to appeal.

22. It is convenient first to consider the basis under the Regulations on which the First Instance Circuit decided the case in favour of Mr Jain.

The approach to the Regulations

23. The present dispute is a dispute between a consumer and a business; in many jurisdictions there is extensive consumer protection legislation which makes detailed provision for consumer disputes. There is no specific QFC Regulation in relation to

consumers. It was not argued that the State of Qatar's consumer law, Law No.8 of 2008 on Consumer Protection, was applicable. It appears that was because it contained no provisions that cover the issues in this dispute and in particular the claim by Devisers to retain the entirety of the fee in the event of non-performance by the consumer even though it performed only a small part of the services it had agreed to provide.

24. It follows, therefore, that the Regulations are the applicable law under the provisions of article 2 of the Regulations. It is necessary to make some observations about the approach we have taken to the Regulations in light of the Court's case law, as this is the first occasion on which this Court has had to consider the articles relating to mistake and force majeure and impossibility of performance.

25. In *Chedid v Said Boa Aya* [2105] QIC A (2) at paragraph 18 in relation to a submission that the Court should be guided by English case law, this Court said:

> *This is not the correct approach. QFC regulations set out detailed codes of employment law and general contract law. Some of the provisions reflect principles of common law, but in many respects conditions in Qatar differ markedly from conditions in England and other common law countries. When issue is governed by a QFC Regulation, the correct approach is to apply that Regulation according to its natural meaning and having particular regard to conditions in Qatar. Foreign jurisprudence can sometimes be of assistance, but it should be used sparingly as a last and not a first resort.*

26. The importance of these observations was affirmed in *Leonardo v Doha Bank Assurance Company* [2020] QIC (A) 1 at paragraphs 41-46 and *IFSQ v Employment Standards Office* [2022] QIC (A) 1 at paragraphs 28-31 and 55, where the Court made it clear that it would take into account international practice where relevant.

27. It is clear from the whole of the Regulations that they were drafted so as to apply to disputes between businesses. Therefore, in applying them, the Court must give effect to the considerations that are of paramount importance to business - the principle of freedom of contract, certainty and predictability of the law as to the outcome of a dispute, and holding parties to their bargain. In some instances, it may also be necessary to adapt the law to keep pace with commercial change and to serve the development of business at the QFC by giving effect to market practice.

28. We anticipate that in most cases where the Regulations are applicable, the issues can be determined by interpretation in this way, as they are well drafted and clear. However, consideration of the issues in this case and in *Asma Al-Saud v Devisers Advisory Services LLC* [2024] QIC (A) 3 (which was also before us at the same time as this case) has shown there are circumstances where the provisions do not extend to all the issues that arise in their entirety. Unlike the provisions in some codes of contract law, there is no commentary to provide guidance as for example in the UNIDROIT principles applicable to international commercial contracts. Despite extensive enquires we have caused to be made, it is not clear how the draftsman intended the Court determine circumstances not covered by the specific provisions of the Regulations. Guidance must therefore be derived from the language and system of the Regulations, the fact that they were broadly based on English common law, and the considerations we have set out in relation to the needs of business.

29. Although the way in which this Court will interpret and develop the Regulations will be by interpretation of all its provisions in the circumstances of each case, its general approach will be to keep its interpretation as far as possible in line with the law generally applicable transnationally to business transactions and in particular English law as modernised by statutes applicable to business transactions. One example of the modernisation of English common law was the Law Reform (Frustrated Contracts) Act 1943 which changed the common law position in respect pre-payments and for expenditure incurred in the performance of a contract when a contract became impossible to perform. However, as appears from this judgment, we also take into account the provisions of the Civil Law of Qatar where it provides guidance and assists in achieving consistency.

30. In the light of that approach, we consider the issues in this appeal.

Mistake

31. The First Instance Circuit considered that the provisions of article 33 might have been applicable, but was unable on the evidence to determine that the mistake on which the Claimant relied might have arisen before the conclusion of the agreement. We can therefore deal with this issue briefly as it was not the basis of the decision of the First Instance Circuit.

32. In our view, this was not a case where the issue of mistake arose or, if it had, the conditions in article 33(2) would have been satisfied. The mistake which was said to have arisen was the erroneous assumption that IVF treatment would proceed, and she would be in a condition to travel. The decision to apply for a visa was made after the IVF treatment had commenced and the FET cycle initiated. It is inconceivable that the risks were not explained to Mr and Mrs Jain as that is well recognised practice and spelt out in detail in documents that are generally available and submitted to the Court by Devisers. Furthermore, the decision to cancel the FET cycle was not made until 10 April 2022. A fresh PET cycle was begun again in May 2022. Devisers had acted in reliance on the agreement as it had listed the documents required and begun the process of initiating the application. It is clear therefore that this was not a case of mistake. It is not necessary for us to say more as consideration of article 33 must await a case where mistake actually arises as an issue.

Force majeure

33. The decision of the First Instance Circuit in favour of Mr Jain was based on its view that Mrs Jain's medical condition amounted to force majeure which made the execution of the agreement impossible within the terms of article 94.

34. However, there was no medical evidence before the Court that indicated any of part of the IVF treatment amounted to force majeure or made the execution of the agreement impossible. On the evidence, the decision to discontinue the FET was made on 10 April 2022 and a further attempt was made in May 2022. There was nothing to suggest that the IVF treatment made applying for the visa or going to the UK if it was granted impossible. Nor was there any evidence that Mr Jain could not have foreseen that there might have been medical issues in relation to the transfer of the embryos; any medical practitioner would have explained the risks including the condition that eventuated. There was, in our view, no force majeure event within article 94(1) and nothing made the performance of the contract impossible. It was, for example, possible to obtain the visa but not to travel immediately.

35. Furthermore, even if there had been, it would have been necessary to consider how the provisions of article 94 operated to entitle Mr Jain to reimbursement of the fee paid.

This is not an issue specifically addressed in article 94. Nor is it in the circumstances necessary for us to consider the way in which the provisions of article 94 reflect the English law of frustration on which Mr Jain relied by his citation of the two cases to which we have referred.

36. In short, this was not a case to which the provisions of article 94 had any application.

Consequences of Mr Jain's termination of the agreement

37. However, Mr Jain undoubtedly terminated the agreement in circumstances in which he was not entitled to do so. We therefore turn to consider the provision of the Regulations that address damages and termination.

38. Devisers claimed it was entitled to retain the fee paid under clause 5 on page 1 and clause 1 on page 2; under clause 5 that entitlement was said to arise, "*if the client revokes the agreement or changes his/her mind*" and under clause 1, "*if you decline our offered services before your Visa application is submitted*". It did not put forward any evidence of any loss or damage it had sustained as a result of the termination.

39. In considering those provisions of the agreement, it is necessary to have regard to two further articles of the Regulations:

    a. Article 107 makes provision for liquidated damages:

        (1) Where the contract provides that a party who does not perform is to pay a specified sum to the aggrieved party for such non-performance, the aggrieved party is entitled to that sum irrespective of its actual harm.

        (2) However, notwithstanding any agreement to the contrary, the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances.

    b. Article 115 makes provision for restitution:

        On termination of a contract either party may claim restitution of whatever it has supplied, provided that such party concurrently makes restitution of whatever it has received. If restitution in kind is not possible or appropriate allowance should be made in money whenever possible.

40. Each of these provisions, if applicable, gives the Court power to achieve a just result. Ordinarily, the Court would ask for assistance from the parties, but in the light of the fact that the sums in issue were towards the lower end of the Small Claims Track scale, we considered that it was not in the interests of justice to require further submissions from the parties and the consequent further costs.

41. Clause 5 and Clause 1 appear to be drafted in terms to enable Devisers to maintain that the clauses give the client an option to withdraw from the agreement or that it is a fixed fee agreement with the fee payable in any event and; that the clauses are therefore not within the scope of article 107. Can it therefore be successfully contended that article 107 is inapplicable? A clause could probably be drafted to make article 107 inapplicable, but we do not consider that the clauses in Devisers terms and conditions achieve that result; in the circumstances of this agreement, the terms and conditions of the agreement must be strictly construed against the party relying on them. Article 107 refers to a party who does not perform; Mr Jain in revoking the agreement or changing his mind or declining Devisers' services before the visa was issued was on analysis thereby not performing his obligations under the agreement. The provisions of clause 1 and clause 5 therefore fall within article 107.

42. Article 107 does not expressly extend to the retention of a sum paid as distinct from an obligation to pay a further sum. However, the purpose of a liquidated damages clause is to specify a sum due on non-performance; it makes no difference to the achievement of that purpose whether (i) the sum has been paid in advance and is to be retained after the occurrence of the non-performance, or (ii) a sum is to be paid after the occurrence of the non-performance.

43. We therefore conclude that article 107 should be purposively interpreted so that it extends to the retention of a sum paid. This approach is in line with the provisions of articles 256, 263 and 266 of the Civil Law of Qatar of 2004.

44. Under the terms of article 107 (2), the Court has the power to reduce to a reasonable amount the sum if it is, "*grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances*."

45. There can be no doubt that the sum is grossly excessive in relation to the harm resulting from the non-performance. We consider that although Devisers did some work and would be entitled to damages for that work, the sum is comparatively small. We have looked at the work done over the period between the contract date and the termination, including the provision of the draft application and also the fact that the work had to be done at speed given the proximity of the change in the appliable UK law. On this basis we assess the amount Devisers should receive for the work it did and as damages as QAR 5,000.

46. It is not therefore necessary for us to consider the provisions of article 115.

47. We therefore vary the order of the First Instance Circuit by requiring Devisers to repay QAR 28,000 to Mr Jain.

48. The First Instance Circuit did not make any order for the payment of interest. Under the terms of its judgment, the obligation to repay arose 14 days from the date of the judgment. Given the conclusion we have reached, we take the view that Mr Jain is entitled to be compensated for the loss of opportunity he has had to utilise the funds which Devisers has had the benefit of using from about 14 days after the date of the judgment of the First Instance Circuit.

Costs

49. Subject to any submissions the parties may wish to make within 14 days of the date of this judgment, the Court considers that no order should be made as to the costs incurred on the appeal as each party ought to bear their own costs. It will therefore provisionally order that Order of the First Instance Circuit to stand as Mr Jain had to bring the proceedings to recover the bulk of the money he had paid.

By the Court,

[signed]

Lord Thomas of Cwmgiedd, President

A signed copy of this Judgment has been filed with the Registry.

Representation

The Claimant was represented by Mohammed Majid Al-Hajri, of the Mohammed Majid Al-Hajri Lawyer Office (Doha, Qatar).

The Defendant/Appellant was self-represented.

DIGITALLY SIGNED AND VERIFIED
موقّع رقمياً ومعتمد